M E M O R A N D U M

June 12, 2000

TO: Public Disclosure Commission Members

FROM: Steve Reinmuth, Assistant Attorney General

SUBJECT: **Commission WAC 390-12-250(9)**
City of Seattle/King County

The City of Seattle and King County want you to consider a petition for declaratory judgment regarding allegations that the City and County have violated RCW 42.17.190 when they indirectly lobby the legislature with public funds. The depth of the lobbying and the source of public funds are currently under investigation based on a complaint by a citizen.

The City and County want you to ignore the following Public Disclosure Commission regulation because they do not want the investigation to reveal the facts and because they believe that RCW 42.17.190 permits public officials to lobby with public funds through other people and groups indirectly.

Commission enforcement staff recommends that you follow Commission policy and allow the facts and law to be presented to you together in the context of the enforcement case that may be brought against the City and County.

Commission WAC 390-12-250(9) says:

> [t]he commission will decline to consider a petition for a declaratory order or to issue an order when (a) the petition requests advice regarding a factual situation which has actually taken place, or (b) when a pending investigation or compliance action involves a similar factual situation.
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> (emphasis added).

The Commission adopted this rule in a clear attempt to be sure that respondents cannot work the Commission against its own enforcement staff during the course of an investigation. If a complaint has been received, and an investigation is pending, the Commission has always refused to hear a declaratory judgment petition. Instead, the Commission has allowed the investigation process to run its course and determine, under the facts developed in the investigation, if charges are even filed, whether the law applies to the facts at issue.

The Commission should follow is own regulation for three primary reasons.

First, declaratory judgments should be sought by those seeking to comply with the law before some set of facts has already occurred. The Commission has indicated that when those

subject to Commission regulation seek advice proactively before a course of action is taken, it will offer the declaratory judgment remedy to avoid enforcement actions. However, when a complaint is filed and an investigation is pending, the Commission will hold fast to a determination that it is too late for the respondent to then seek advice to help it defend itself from an investigation or a hearing. Your regulation also is based upon the concept of judicial economy. In other words, if a complaint is filed and an investigation is pending, you will wait to see the results of the investigation before you consider legal arguments by a respondent. If charges are not even filed, you will review the complaint for dismissal to see if you agree with staff. If charges are filed, you will review legal arguments in context and hear the legal arguments only once instead of judging what might be the facts in advance.

Second, a court would likely determine that the Commission was "arbitrary and capricious" under the Administrative Procedures Act, if you did not follow your own regulation or if you follow it selectively. The Commission used the words "will decline" instead of "may decline" to make it clear that it will not exercise discretion on this question. Many possible petitioners and respondents have already relied on the clear wording of the regulation and the number of petitions for declaratory judgment before the Commission has been low and focused on future conduct only. If the interpretation were to change, future respondents and petitioners would see the petition for declaratory judgment as the tool to diffuse Commission enforcement action. Settlements of commission enforcement action may decrease as respondents vie for the Commission's ear before an investigation can even be completed.

Finally, investigations frequently lead to violations that were not known by the complainant or staff under the investigation is completed. To determine, in advance, during an investigation, that a law may not apply to a given set of facts precludes the public from determining whether disclosure and campaign finance laws have been violated by a respondent.

In sum, the Commission has always held that a full investigation will be conducted when a complaint is made to ensure that the public disclosure laws are fully enforced and potential violations are fully addressed. It would be a dangerous precedent to depart from that historical policy decision which has been clearly stated in WAC 390-12-250(9).

I would be happy to answer any further questions on June 20 during the Commission meeting.

BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

ON THE PETITION OF THE CITY OF SEATTLE AND KING COUNTY FOR DECLARATORY ORDER	PDC No. _____ PETITIONERS' MEMORANDUM IN SUPPORT OF UNDERTAKING PROCEEDINGS TO ISSUE A DECLARATORY ORDER

Introduction

Petitioners King County and the City of Seattle have filed a Petition for Declaratory Order concerning the legality of so-called "indirect lobbying" by local government agencies. At issue on June 20 is whether the Commission should consider the Petition while there are pending against Petitioners complaints alleging conduct Commission staff may determine constitutes illegal indirect lobbying.[1]

Petitioners ask the Commission to address the Petition at this time because it presents the most economical and efficient way to resolve the legal questions that underlie not only the pending but also many potential future complaints, and it avoids needlessly exposing well-intentioned local agencies and their officials and employees to those future complaints.

I. A Declaratory Order is the Most Efficient and Only Final Way to Resolve the Legal Issues.

A. The Legal Questions Arise from an Isolated Statement Lacking Legal Analysis.

RCW 42.17.190 has applied to local government lobbying since 1977. For almost twenty years no one appears to have complained about or raised with the Commission the use of government resources to lobby through others besides government employees. For over twenty years, local governments have lobbied indirectly through outside, private persons. To this day there is no Commission rule defining, much less specifically restricting such lobbying.

In 1996, apparently for the first time, the Commission made reference to "grass roots lobbying"[2] in connection with local government lobbying. While purporting merely to answer a

[1] The Commission's staff had begun investigations based on those complaints, but has agreed to hold the investigations in abeyance pending the Commission's decision whether to consider this Petition.

[2] RCW 42.17.200 defines this phrase and requires all "persons" (a term that includes governments) who engage in such lobbying to report their efforts.

question of whether school districts are permitted to "lobby" under RCW 42.17.190(3) with respect to an initiative to the legislature, the Commission also made the statement, without including any legal analysis or argument, that "[S]chool districts are banned from using public resources to undertake grass roots lobbying efforts." Declaratory Order 14 at 8 (1996). Apparently building on this sentence over the past four years, Commission staff seems to have applied RCW 42.17.190, perhaps incorrectly, to broadly ban the use of public funds for what staff has come to call "indirect lobbying" to influence state legislation.

The problem with the supposed ban on "indirect lobbying" is that the Commission has not provided useful guidance for public officials. On the one hand, state law and Commission publications instruct local governments to report public expenditures for outside "private sector" lobbyists to carry their local message to Olympia. On the other hand, Commission staff has taken enforcement action against government officials who enlist volunteer students and interested community members to carry similar messages to Olympia. (See, e.g., In Re Yakima Valley Community College, Case No. 97-272.)

B. Procedural Efficiency Makes the Declaratory Proceeding the Best Course of Action.

1. The Pending Complaints Can Be Largely Resolved If the Underlying Legal Issues Are Comprehensively Addressed.

The pending complaints against Petitioners, particularly those against Seattle, will require extensive development of facts in the event they are processed by the Commission as enforcement hearings. For example, the complaints against Seattle concern events that occurred over the course of nearly a year and involved scores of people, dozens of meetings, and hundreds if not thousands of pieces of correspondence (including many e-mails with long lists of recipients). The people who initiated and received various communications include elected officials, government employees, outside contractors, volunteer commission members, interested citizens, disinterested citizens, non-profit agencies that have strong alliances with local government, contractors to those non-profits, and so forth, but in the case of each communication, the nature and capacity of the sender and all recipients are complex and tedious to discern. Should these complaints result in enforcement hearings, the investigation and defense would require presentation of the details contained in reams of paper and hours - if not days - of live witnesses.

Fortunately, the Declaratory Order process offers a way to resolve the current concerns simply and efficiently, without the need for development of an extensive factual record, if the Commission is willing to decide the legal issues in this manner. If Petitioners are correct that state law does not ban indirect lobbying with public funds (or if the Commission finds a legal basis to set some reasonable, narrow limits on what constitutes prohibited indirect lobbying), then there will be absolutely no need for staff to investigate the details of the accusations in the complaints or bring any enforcement proceeding at all. On the other hand, should the legal issues be finally resolved against Petitioners through a Declaratory Order process, both the City and the County anticipate that few if any factual issues would still be material and a stipulated resolution would be possible.

Therefore, this Declaratory proceeding will save taxpayer resources on all sides, while accomplishing far more than can be achieved through a costly and time-consuming adversarial proceeding.

2. A Declaratory Proceeding Would be Necessary Eventually Anyway, and A Declaratory Order Will Resolve More Questions than Can be Addressed Through Piecemeal Enforcement Cases.

An early declaratory proceeding will provide the finality and guidance an enforcement proceeding simply cannot. Resolution of the pending complaints is likely to leave unresolved such key questions as, for example, whether the replaying on cable TV of a City Council meeting at which the City's annual state legislative agenda is advocated and adopted constitutes impermissible "grass roots lobbying." What about the posting on the City's website on the Internet of that same legislative package, which contains explanations of why the City advocates or opposes each bill or potential bill topic?[3] May County officials expend funds to invite interested citizens to participate in a forum to develop a plan to address community needs if such forum includes a discussion of possible legislative proposals? The Petitioners and other local governments must obtain answers to these types of questions. They would have to refile this same Petition for Declaratory Order to resolve these and related issues even after litigating any enforcement actions. It simply makes sense to tackle the matter comprehensively now so the outcome can be logical and consistent and can provide timely needed guidance to well-intentioned local officials.

Moreover, it is only fair to provide comprehensive guidance in advance to well-intentioned government officials throughout the state. Gradually developing the parameters of permitted and impermissible "indirect lobbying" through settlement or adjudication of individual enforcement actions would leave development of the law to the vagaries of which activities happen to trigger complaints, and needlessly exposes government officials and employees to damaging charges and costly penalties. Because in many enforcement cases a respondent would rather settle than litigate the legal issue (an influence apparent in the handful of post-1996 cases that have been before the Commission), the case-by-case process is unlikely to define the boundaries of the law in a clear, consistent, and useful way.

3. A Declaratory Proceeding Provides a More Collaborative Forum in Which to Delve into the Legal and Policy Issues at Stake.

Although Commission staff and local government representatives always attempt to work collaboratively in any proceeding, the very nature of an enforcement proceeding risks accusations and disagreements about whether everyone is cooperating adequately, using proper procedures, and so forth. In contrast, a Declaratory proceeding makes it easier for staff, Petitioners, and their respective counsel to consider the central issues of what the law really is and how it is reasonably interpreted in a non-adversarial, non-accusatory proceeding. Because staff, Petitioners, and counsel can work together to present their comprehensive interpretations of the law (which might be identical or might vary greatly), the Declaratory proceeding affords a unique opportunity for the Commission to provide more useful and complete guidance.

II. Numerous Arguments Support the Petitioner's View that State Law Permits "Indirect Lobbying" by Local Governments.

[3] Similarly, at the state level, may the Attorney General inform members of her Consumer Privacy Workgroup that her consumer privacy bill has been introduced and give them the name and address of the chair of the committee to which it has been referred? May she explain to citizens on her website the reasons she believes the bill is needed and notify them of upcoming legislative hearings on her proposed legislation?

Complete legal arguments in support of Petitioners' viewpoint will be presented in connection with the proceedings on the merits of the Declaratory Order, should the Commission elect to consider the Petition. But a brief and general preview here of some of the supporting material demonstrates that the supposed ban of "indirect lobbying" has no firm basis in law.

A. A Narrow Reading of the Statute Would Lead to Strained and Unintended Results, and Be In Conflict With Other Parts of Chapter 42.17 RCW.

Two distinct authorizations for ways to use public funds for lobbying appear in RCW 42.17.190(3):

- providing information or communicating on matters pertaining to official agency business to any elected official or officer or employee of any agency, and

- advocating the official position or interests of the agency to any elected official or officer or employee of any agency.

The position that "indirect lobbying" is prohibited apparently stems from the belief that the use of the word "to" in these authorizations should be read as limiting the method of authorized lobbying to only "direct" communications with legislators or other government officials. Such a narrow reading of "to" leads to results that are both strained and inconsistent with reporting requirements of other parts of Chapter 42.17 RCW.

Under this narrow reading, local government would be required to hire as an employee anyone who attempts to influence the Legislature on that government's behalf. It could not enlist a consultant acting as a paid independent contractor, or request an unpaid volunteer to communicate, advocate or testify to legislators or a legislative committee. This could not have been the Legislature's intent, since local governments have consistently hired contractors and, Petitioners submit, enlisted the aid of volunteers sharing interests with local governments, to present their messages to legislators.

This narrow reading also would produce internal inconsistencies with other parts of governing law. RCW 42.17.190(4)(c) contemplates the reporting of lobbying expenses that include "consultant or other special contractual services, and brochures and other publications." This analysis demonstrates that the Legislature did not intend to prohibit all "indirect lobbying" by local governments.

B. Legislative History Supports Petitioners' View.

In 1972, the voters approved Initiative 276 which, in part, codified a general prohibition on state agencies' use of public funds for lobbying while also granting express authorization for certain limited lobbying activities. In AGO 1976 No. 3 the Attorney General confirmed that the general prohibition in Initiative 276, by then codified as RCW 42.17.190(2), did not apply to local governments. Based on the prior opinions of the Supreme Court, however, the Attorney General opined that most local governments were similarly prohibited from so expending their funds, but that charter cities and counties could self-authorize lobbying expenditures because such entities are held to possess the same legislative power as that possessed by the legislature, subject only to the limits imposed by the constitution or conflicting acts of the legislature.

In 1977, the House of Representatives had before it ESB 2282 which, among other things, would amend RCW 42.17.190 to permit limited use of public funds for lobbying by local governments. The House Elections and Governmental Ethics Committee proposed an amendment to RCW 42.17.190(2) which would read as follows:

> (2) ((~~Unless expressly authorized by law, no state funds shall be used directly or indirectly for lobbying: PROVIDED, this shall not prevent state officers or employees from communicating to the legislature, through the proper official channels, requests for legislative action or appropriations which are deemed necessary for the efficient conduct of the public business or actually made in the proper performance of their official duties: PROVIDED FURTHER, that this subsection shall not apply to the legislative branch.~~)) Any agency may expend public funds to compensate its officers and employees for services rendered on behalf of the agency in connection with lobbying only to the extent that such officers or employees are advocating the official position or interests of the agency, or providing information to or communicating with any elected official or officer or employee of any agency on matters relating to official agency business: PROVIDED, That public funds shall not be expended as a direct or indirect gift or campaign contribution provided to any elected official or officer or employee of any agency. For the purposes of this subsection, the term "gift" shall mean a voluntary transfer of real or personal property of any kind without consideration of equal or greater value, but shall not include informational material such as books, reports, pamphlets, calendars or periodicals. No payment for travel or reimbursement for any expenses shall be deemed "informational material." (from Message from the House, May 25, 1977)

This narrow amendment would have limited expenditures to "compensation for officers or employees," but it was rejected. Rather, a significantly broader amendment was eventually adopted. (Laws 1977, Ex. Sess., ch. 313, sec.6).

The adopted amendment read as follows:

> (2) Unless authorized by subsection (3) of this section or otherwise expressly authorized by law, no ((~~state~~)) public funds shall be used directly or indirectly for lobbying: *Provided,* This shall not prevent ((~~state~~)) officers or employees of an agency from communicating with a member of the legislature on the request of that member; or communicating to the legislature, through the proper, official channels, requests for legislative action or appropriations which are deemed necessary for the efficient conduct of the public business or actually made in the proper performance of their official duties: Provided, further, That this subsection does not apply to the legislative branch.

> (3) Any agency, not otherwise expressly authorized by law, may expend public funds for lobbying, but such lobbying activity shall be limited to (a) providing information or communicating on matters pertaining to official agency business to any elected official or officer or employee of any agency or (b) advocating the official position or interests of the agency to any elected official or officer or employee of any agency: PROVIDED, That public funds shall not be expended as a direct or indirect gift or campaign contribution to any elected official or officer or employee of any agency….

Had the Legislature intended to limit public funds to paying only local government officers and employees to lobby the Legislature, it could have adopted the House Committee's amendment. That it adopted broader language compels the conclusion it intended broader results.

C. The Commission's Publications Point Out that the Purpose of RCW 42.17.190(3) is to Avoid Mixed and Unauthorized Lobbying Messages.

The Commission's flyer entitled "Spending Public Funds to Lobby (1996)" explains the intent of RCW 42.17.190 as follows:

> The legislature appears to be saying that it wants employees to refrain from using public funds to discuss subjects not related to their agency's mission. Further, legislators do not want to receive "mixed messages" from different individuals within an agency.

This reasonable reading of RCW 42.17.190(3) does not attribute to the Legislature any intent to prevent local governments from advocating their officially-adopted positions through others than their own employees or officers. Nor is there anything in the legislative record to indicate such a purpose by the Legislature.

Petitioners will more thoroughly expound on the ample support for their views when briefing on the merits is submitted. It should be clear from the above, however, that there is a solid case to be made and that this examination of the issue is a worthy undertaking for the Commission.

III. It Would Be Lawful and Proper for the Commission to Entertain the Petition at this Time.

A question has been raised whether, given WAC 390-12-250(9)[4], the Commission can consider the Petition for Declaratory Order. The language of WAC 390-12-250(9) ("will decline" rather than the mandatory "shall decline") suggests that it is a predictive rule, rather than a rule limiting the Commission's power. Coupled with the general principles set forth below, it does not preclude the Commission from entertaining the Petition.

The Washington Court of Appeals stated that "where a statute is merely a guide 'for orderly procedure rather than a limitation of power, it will be construed as directory only.'" Seatoma Convalescent Center v. Dep't of Social Health Servs., 82 Wn.App. 495, 513, 919 P.2d 602 (Div. II, 1996), *rev. denied*, 130 Wn.2d 1023, 930 P.2d 1230 (1997). In that instance, the Court was addressing the language of former WACs 388-96-722(1) and 388-86-735(1)[5]

It is well settled that an administrative body must follow its own rules and regulations when it conducts a proceeding which can deprive an individual of some benefit or entitlement. Ritter v. Adams County Public Hospital District No. 1, 96 Wn.2d 503, 637 P.2d 940 (1981). In the current situation, however, the Commission would not be conducting a proceeding which could deprive an individual of a benefit or an entitlement. The proceeding only involves the City and County asking the Commission to issue an interpretation of law.

As well, there is a general principle that "it is always within the discretion of a court or an administrative agency to *relax or modify its procedural rules adopted for the orderly transaction of business before it* when in a given case the ends of justice require it. Such an action is reviewable only upon a showing of substantial prejudice to the complaining party." Mentor v. Kitsap County, 22 Wn.App. 285, 288, 588 P.2d 1226 (1978)(emphasis added)(*citing* American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970)).

The Commission's predictive administrative rule does not stand in the way of efficiency and the interests of educating and guiding local officials through this Declaratory proceeding.

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[4] WAC 390-12-250(9) provides:

> The commission will decline to consider a petition for a declaratory [order] or to issue an order when (a) the petition requests advice regarding a factual situation which has actually taken place, or (b) when a pending investigation or compliance action involves a similar factual situation.

[5] WAC 388-96-722(1): "[DSHS] *shall* pay the nursing services cost area reimbursement rate for the necessary and ordinary costs of . . ." (emphasis added).

WAC 388-96-735(1): "[t]he administration and operations cost area reimbursement rate *will* reimburse for the necessary and ordinary costs of . . ." (emphasis added).

Conclusion

Considering the Petition now would advance the goal of interpreting state law so as to make sound public policy in an efficient and comprehensive way. Conducting a declaratory proceeding now can avoid lengthy investigations and hearings, while authoritatively resolving questions on which individual enforcement actions cannot possibly give sufficient guidance.

The Petitioners are ready to fully brief the core legal issues and provide the Commission with a solid basis for a careful review of an issue that to date has not benefited from comprehensive analysis. Government agencies, public servants, and citizens throughout the state will benefit from the clarity this proceeding will bring.

Petitioners respectfully ask the Commission to set this matter for briefing and a hearing at the next available opportunity.

Respectfully submitted this 12th day of June, 2000.

NORM MALENG
King County Prosecuting Attorney

By: _____
David Regnier, WSBA No. 16839
Deputy Prosecuting Attorney
Attorneys for King County

MARK SIDRAN
Seattle City Attorney

By: _____
Sandra L. Cohen, WSBA No. 11304
Assistant City Attorney

By: _____
C. James Frush, WSBA No. 7092
GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM

Attorneys for the City of Seattle